12-23-1975

Strunk Construction Company, Inc. v. James Lee Stewart and J.D. Mullican, Inc.

Appellant's Brief 1975-SC-1023

APPELLANT'S BRIEF

COURT OF APPEALS OF KENTUCKY

NO. 75-1023

STRUNK CONSTRUCTION COMPANY, INC., APPELLANTS,

Versus

JAMES LEE STEWART and J.D. MULLICAN, INC., APPELLEES.

Appeal from the Pulaski Circuit Court,
Hon. Lawrence S. Hail, Judge

BRIEF FOR THE APPELLANT

I hereby certify that the within Brief has been served by mailing true copies hereof to Hon. Lawrence S. Hail, Trial Judge, 525 N. Main Street, Somerset, Kentucky; and to Hon. John G. Prather, Prather Building, Somerset, Kentucky 42501, attorney for Appellee, James Lee Stewart and to Hon. Charles C. Adams, P.O. Box 35, Somerset, Kentucky 42501, attorney for Appellee, J.D. Mullican, all on this 23 day of December, 1975.

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BRIEF FOR THE APPELLANTS

MAY IT PLEASE THE COURT:

STATEMENT OF THE CASE

(a) Statement of Proceedings

This is an appeal from a Judgment of the Pulaski Circuit Court in an action instituted by the Appellee, James Lee Stewart, plaintiff in the Court below, against the Appellant and the Appellee, J.D. Mullican, Inc., co-defendants in the Court below.

The parties to this action will be referred to herein as "Stewart," for the Appellee, James Lee Stewart; as "Mullican" for the Appellee, J.D. Mullican, Inc.; as "Strunk" for the Appellant Strunk Construction Company, Inc.; and as "Hinkle" for Hinkle Contracting Corporation, a

defendant in the Court below, dismissed as a party. The transcrip of the proceedings and evidence as prepared by the Official Reporter of the Pulaski Circuit Court will be referred to by the abbreviation "Tr." The record of the Pulaski Circuit Court as prepared by the Circuit Court Clerk will be referred to by the abbreviation "R." Dates used to identify pleadings, orders and depositions are the filing dates stamped thereon by the Clerk below.

This action was brought in the Court below, by the filing by Stewart of his Complaint on January 28, 1972, therein alleging that Strunk in refusing to load crushed stone into the trucks of Stewart, willfully maliciously and intentionally interfered with the performance by Stewart of a contract he had with Mullican for the hauling of stone to a construction site, thereby proximately causing Stewart damage. Stewart further alleged that Strunk committed the alleged acts for the purpose of favoring other haulers, thereby engaging in a conspiracy perpetrated for the purpose of interfering with Stewart's contract rights and his business. Stewart also contended in his Complaint that Strunk unlawfully, willfully and intentionally caused Somerset Stone Company, Inc., a local stone company, to pay over to Strunk, the sum of $909.85 owed by Somerset Stone Company, Inc., to Stewart, all without legal right and without the consent of Stewart. Hinkle was named as a party by Stewart because of the alleged business relationship between it and Strunk. Stewart for his cause of action against Mullican, alleged that it failed to intercede on behalf of Stewart with Strunk, continued, after the acts by Strunk complained of, to do business with Strunk, and failed to perform its contract

with Stewart, thereby breaching said contract. Stewart sought compensatory damages against Strunk, Hinkle and Mullican, and punitive damages against Strunk and Hinkle.

Hinkle and Strunk each filed an Answer, respectively, on March 1, 1972, and March 7, 1972, alleging that Stewart's Complaint failed to state a claim and generally denying the allegations of the Complaint.

After having filed on November 9, 1972, its Motion for Summary Judgment, same being overruled by the Court below, Mullican filed on January 24, 1973, its Answer, Counterclaim and Crossclaim. Mullican answered the Complaint by in general denying any wrongful acts on its part as related to Stewart, setting up an impossibility of performance by Stewart, and asserting a mutual termination of its contract with Stewart. Mullican further alleged in its Answer that it purchased stone from Strunk only on a day-to-day basis, having no contract with Strunk, and that after November 5, 1970, it purchased all of its required stone from Strunk, on the basis of a delivered, "on site," price. Mullican affirmatively denied that Stewart apprised it of his readiness and ability to haul stone for it. Mullican sought by its Counterclaim against Stewart to recover from Stewart damages resulting from Stewart's failure to perform his contract with Mullican. Mullican alleged in its Cross-claim that Strunk and Hinkle, by their acts, interfered with Stewart's ability to perform his contract with Mullican, thereby damaging it. The Crossclaim also sought indemnification from Strunk and Hinkle against any recovery in favor of Stewart against it.

Strunk, Hinkle and Stewart responded to Mullican's Coun-

terclaim and Crossclaim by denying the allegations thereof pertaining to wrongful acts on their respective parts. Stewart further alleged that the acts of Strunk and Hinkle were the proximate cause of Stewart's breach of Mullican's contract with him.

Upon trial, the Motions of Strunk and Hinkle for a directed verdict, made at the conclusion of Stewart's evidence, the conclusion of Mullican's evidence and the conclusion of all evidence were overruled.

Judgment was entered by the Lower Court on July 7, 1975, in conformity with the jury's verdict.

Thereafter, on July 17, 1975, Strunk and Hinkle filed their joint Motion for Judgment Notwithstanding the Verdict and in the alternative, Motion and Grounds for New Trial. The Court below sustained the Motion for Judgment Notwithstanding the Verdict filed by Hinkle and denied all other of said Motions, thereby dismissing Hinkle.

Strunk filed its Notice of Appeal on August 25, 1975, its Designation of Record on Appeal on August 27, 1975, and a Supersedeas Bond.

This Appeal is prosecuted from the Judgment of July 7, 1975.

(b) STATEMENT OF FACTS

The facts of this case as they pertain to the merits of it and as they pertain to this Appeal, are, relatively speaking, rather simple. The facts of record which, far from sustaining the burden of proof incumbent on the claimants below, show beyond any question a complete lack of factual or legal justification for the claims presented. Certain facts were stipulated by the parties and others were established by the evidence.

Stewart, operating on the basis of a purchase order received from Mullican (Tr. p. 33), hauled stone to Mullican's construction job at the Tecumseh Products plant site for a four (4) day period ending on November 5, 1970(Tr. p. 34, Q. 25-30). During this period Stewart was hauling at the price agreed on with Mullican of 50 c per ton (Tr. p. 33, Q. 22). For the initial phase of the four (4) days of hauling, Stewart hauled from the quarry site of Somerset Stone Company (Tr. p. 34, Q. 26), whereupon, that company's supply of stone was depleted (Tr. p. 35, Q. 34). Thereafter, Stewart sent his trucks to the quarry site of Strunk (Tr. p. 35, Q 35) and for three (3) days, ending on November 5, 1970, did haul stone to Mullican from Strunk, under this purchase order from Mullican (Tr. p. 35, Q. 42). On the morning of November 6, 1970, Strunk refused to load Stewart's trucks with stone (Tr. p. 35, Q. 43). The only reason given or known to Stewart when inquiring into the reasons why loading of his trucks had been refusedwas that Mr. Yocum, President of Strunk, had issued such an order on the night of November 5, 1970, (Tr. p. 36, Q. 47). This information was related to Stewart by Elvin Appleby, Strunk

quarry superintendent (Tr. p. 36, Q. 45-46). At that time Stewart advised Mr. Appleby that he had a purchase order to haul Mullican's stone (Tr. p. 190, Q. 12) but did not show the purchase order to Mr. Appleby (Tr. p. 190, Q. 13). Thereupon, Stewart left the Strunk Quarry site and advised Mr. Grady Mullican, an employee of Mullican, that, he hated to give his job up but he couldn't deliver because Strunk wouldn't load his trucks (Tr. p. 68, Q. 5). At that point Mr. Mullican contacted Strunk or had another Mullican employee contact Strunk relative to buying stone from Strunk (Tr. p. 109, Q. 30) and did in fact make arrangements with Strunk to buy stone from it at an on-site delivered basis, including a charge of 60 c per ton for hauling (Tr. p. 110, Q. 35). Strunk was not a part to the purchase order from Mullican to Stewart (Tr. p. 56, Q. 4). Mr. Mullican testified that he felt in making his agreement with Stewart that all stone needed by Mullican would come from Somerset Stone Company and that Mullican was not aware of the fact that Somerset Stone Company might not be able to complete the job (Tr. p. 108, Q. 19).

Mullican never, until November 6, 1970, after Stewart had been refused loading, had entered into a contractual relationship with Strunk (Tr. p. 100, Q. 11), nor was Strunk obligated to sell stone to Mullican at all until their contract effective November 6, 1970 (Tr. p. 101, Q. 20, 21). The Mullican purchase order given to Stewart was not tied to any particular quarry even if it was 100 miles away (Tr. p. 99, Q. 7).

Before entering into its contract with Strunk, effective November 6, 1970, Mullican did not know why Stewart's trucks were not being loaded (Tr. p. 109, Q. 31) nor did

Mullican ever discuss with Strunk the possibility of Stewart's trucks being used to haul its stone (Tr. p. 111, Q. 43).

Frank Yocum, President of Strunk, issued the order to cease loading Stewart's trucks, which was effective on the morning of November 6, 1970 (Tr. p. 206, Q.8). The reasons or justifications for the issuance of this order was to maintain order and control at the quarry site (Tr. p. 86, Q. 30), for economic reasons involving orders as large as that of Mullican in the instant case (Tr. p. 208, Q. 20), other demands on Strunk's stone (Tr. p. 209, Q. 28, 29) and company policy that large orders of the type present would be sold only on an on-site delivered basis, including hauling charges (Tr. p. 210, Q. 32).

Stewart testified that as a result of the sequence events above enumerated, he lost profits on his Mullican purchase order of 60.2 per cent of the total he would have received had he hauled all stone actually hauled by others to Mullican, or a loss to Stewart of $9,094.77 (Tr. p. 180, Q. 42). Initially, Stewart testified on direct examination that he lost anticipated profits of $10,202.27 (Tr. p. 46, Q. 145). After cross-examination and upon redirect examination, Stewart took into account expenses of wages paid to drivers, gasoline (Tr. p. 176, Q. 2), cost of insurance premiums (Tr. p. 177, Q.9), cost of vehicle licenses (Tr. p. 176, Q. 13), cost of vehicle maintenance (Tr. p. 177, Q. 17), cost of oil (Tr. p. 178, Q. 24), cost of tires (Tr. p. 178, Q. 27), and allowance for depreciation (Tr. p. 179, Q. 35) and arrived at a loss of anticipated profits figure of $9,094.77 (Tr. p. 180, Q. 42). Based on the same data provided by Stewart regarding his costs of operation, the

witness Bill Spenser, engaged in the trucking business (Tr. p. 218, Q. 4) and qualified as an expert in that business was of the opinion that Stewart could have anticipated profits of between $4,250.94 and $4,554.57.

It was stipulated between the parties that Mullican paid $3,036.39 more for the hauling of stone by the drivers used by Strunk than it would have paid if Stewart had hauled that same stone (Tr. p. 12).

Stewart's witness, Richard Cooper, General Manager of the Somerset Stone Company, testified that he was told by somebody in Strunk that Stewart owed it money and asked if he would deduct it from certain monies owed to Stewart by Somerset Stone Company, if agreeable to Stewart (Tr. p. 92, Q. 20). The sum of $909.85 was deducted by Somerset Stone Company from monies it owed Stewart (Tr. p. 92, Q. 21) and upon being told of this by Mr. Cooper when he was presented his check for the balance on July 16, 1971, Stewart replied that he expected it (Tr. p. 94, Q. 4). Stewart accepted the check and left Mr. Cooper's office (Tr. p. 95, Q. 6). Stewart admitted that he owed Strunk the money retained out of his check by Somerset Stone Company (Tr. p. 67, Q. 99). Mr. Yocum, President of Strunk, had asked Mr. Cooper to acquire the money owed by Stewart to Strunk if he (Mr. Cooper) could (Tr. p. 36, Q. 36).

The jury was instructed on the issues of: (1) interference by Strunk with the contractual business relationship between Stewart and Mullican or a conspiracy between Strunk and Hinkle to combine for the purpose of injuring or destroying Stewart's business or interfering with the performance of his

contract with Mullican (R. p. 73, 74); (2) Damages both compensatory and punitive (R. p. 75); (3) The wrongful acquistion by Strunk from Stewart through Somerset Stone Company of certain monies (R. p. 75, 76); and (4) The entitlement of Mullican to a recovery against Strunk.

ARGUMENT

1. The Appellant was entitled to a Directed Verdict as against:

(a) THE CLAIMS OF THE APPELLEE, JAMES LEE STEWART.

Stewart initially seeks a recovery of damages against Strunk on the alternative theories that Strunk interferred with his contractual relationship with Mullican or that Strunk combined to conspire for the purpose of interfering with Stewart's business and the performance of his contract with Mullican. He also seeks a recovery of a specified sum of money from Strunk, wrongfully obtained from him through Somerset Stone Company, Inc. For purposes of clarity the respective claims of Stewart will be dealt with herein separately and in the order set forth

It has long been recognized by this Court that wrongful interference with the business of another is a tort. We are therefore not concerned with a breach of contract by Strunk. We are confined in the instant case to an interference with contract only. As stated by this court in Derby Road Building Co., Inc., vs. Commonwealth of Kentucky, Department of Highways, Ky., 317 SW 2d 891 (1958) at 895,

> "Ordinarily only those who are parties are liable for the breach of a contract, and the parties cannot impose any liability upon a stranger to the contract under its terms."

There can be no question that an interference with the contractual rights of another is not actionable if done in the exercise, by the one chargeable with such interference, of an absolute right of his. This Court said in the case of Brewster v. Miller, Ky. 41 SW 301, 101 Ky. 368:

> "One has the right to decline to enter into a business undertaking with anyone. The law does not impose such an obligation upon anyone."

In the Brewstercase, supra, there was a joinder of funeral directors who within their association, among other things, declined individually to provide funeral services to any person owing a debt to another member of their association. This Court upheld that absolute right and the principle therein propounded remains the law except as modified by recent rulings on the basis of discrimination. There is no contention that this is a discrimination case, nor could there be. Strunk was ready and willing to sell and did sell, its stone to all persons or entities agreeable to buying the product at an on-site delivered price, including a hauling charge. The record clearly discloses that the circumstances of the instant case fell squarely within Strunk's established policies on marketing its product to large jobs and keeping with its need to properly plan for future business requirements. The right exercised by Strunk was the absolute right to it of choosing with whom it would enter into a business undertaking with and to sell its product to. It chose to sell only at an on-site, delivered price and Mullican, of its own free volition elected to accept those terms.

If the acts of Strunk were to be actionable, they must have

constituted an exercise of a right by it in violation of the principles established by this Court regarding interference with the property rights of others. This Court established in 1930, in the case of Brooks v. Patterson, Ky. 290 SW 2d 234 Ky. 757, the principal that:

> "no action ex delicto he's against an intermeddler who, though maliciously or without legitimate interest to serve or justifiable cause, a person to break his contract with another, unless the stranger to the contract has employed unlawful means, such as fraud, deceit, or coercion ..."

This principle was expanded upon in Bell v. Aetna Oil Service, Inc., Ky. 46 SW 2d 757, 242 Ky. 471, wherein this Court said:

> "Business under the present system is competitive in its nature, and, unless one's business has been affected to his detriment and loss by the use of unlawful and fraudulent methods by a competitor whose business has been adversely affected so long as he does not employ unlawful means."

The Court also stated in the Bell case, supra:

> "Whether a man be a trader or not, he is not justified in damaging another's business or profession by fraudulent methods, by, threats, interference with contract, libel or slander of goods, obstruction, or unfair methods of any sort. It is the policy of the law to encourage fair trade in every way."

Finally, in the Derby Road Building Co., Inc., case, supra, this Court established the principle constituting the central thread running these cases when it said:

> "... Liability is predicated upon an international interference, malicious or without justification, with known contractual rights, possessed by the party suing to recover damages therefor."

These then are the necessary elements to be proven, to the degree required of plaintiff in any action, before a cause will lie for interference with contract rights. In the instant case, Strunk must be chargeable with an act it had no right to commit. It is submitted that Strunk had the right (which is justification) to refuse to do business with Stewart or, for that matter, with Mullican. Strunk had no contractual relationship with either Stewart or Mullican obligating it to deal with either of them. It chose to deal with any party who would purchase its stone at an on-site delivered price, and in this case that was Mullican, on those terms.

Let us, however, analyze the various elements of the actionable tort of interference with contract rights in light of the circumstances present in the instant case.

Malice has been defined in this jurisdiction in Tilson v. Commonwealth, Ky. 461 SW 2d 542 (1970) as, "the doing of a wrongful act by one person against another intentionally or with evil intent, without just cause or excuse or as a result of ill will." The record in the instant case is absolutely devoid of any showing of ill will between Stewart and Strunk or between Strunk and Mullican. Likewise, ill will can not be in-

ferred. To the contrary the circumstances clearly show an absence of ill will prior to the act of Strunk complained of, between Strunk and Stewart. Mullican continued to do business with Strunk.

The definition of malice, beyond the question of ill will, becomes intermixed with the other elements of the tort of interference with contract rights, each requiring an intent to do what is done. They are the commission of a wrongful act and the commission of an act without justification, an interference with known contractual rights, coercion and the procurement of a breach of a contract. An analysis of each requires a simultaneous analysis of the other. Strunk had no intent to do anything in this case except exercise its right to do business freely, according to its own terms, within the necessities dictated by the nature of its business, with such persons or parties as chose to deal with it in that manner. The record clearly discloses that it had no obligation known to Stewart or Mullican or Strunk requiring it to sell rock to or load rocks on the trucks of any party and specifically Stewart or Mullican. The only obligation existing was that of Mullican to Stewart, and that without being tied to any supplier of stone, regardless of location, Frank Yocum, President of Strunk, and the only man giving the order to cease loading Stewart's trucks stated categorically that he had no knowledge of where trucks were hauling to the Mullican job site when he gave the order to cease loading those trucks, nor was it important. What was important was that on a large order of stone, requiring a large percentage of the stone of that type produced by Strunk during a year, without any assurance that it would not interfere with

other commitments of the company and because of the disruptive effect thereby on the operation of the quarry, such order would only be handled by Strunk on an on-site, delivered price basis. Likewise, it was completely established, without contradiction, by all parties that until after the order to cease loading Stewart's trucks had been given and in fact, after that order had been put into effect on November 6, 1970, there was no knowledge on the part Strunk of the only contractual relationship present in this case, that time, that being between Stewart and Mullican. It is submitted that there could not possibly exist an intent to wrongfully interfere with another's known contractual rights, with malice or without justification, when there is no intent, no malice, no wrongful act, complete justification and a complete lack of knowledge of the contractual rights supposedly interfered with.

Stewart would further contend that Strunk coerced Mullican into breaching their contract and thereby or by other means procured the breach of that contract. Nothing could be further from actuality. Strunk did not approach Mullican. It had some two to three months before the acts complained of quoted certain prices to Mullican, but upon being turned down, given up on the sale or job and devoted its attention elsewhere. There is nothing in the record to show any contact between Mullican and Strunk until after Stewart's trucks were stopped at which point in time, without further inquiry into the Stewart situation or without further inquiry into the availability of stone from a source other than Strunk, it contacted Strunk and then and there voluntarily agreed to purchase stone from Strunk on an on-site, delivered price basis. By its own ad-

mission, Mullican had no obligation to buy stone from Strunk, but did so voluntarily, apparently for economic reasons. That, however, is what this case is all about. Mullican did not choose to exercise alternatives available to it to enable Stewart to haul its stone. Mullican's contract with Stewart was not tied to any other quarry, even if it was 100 miles away. There can be no coercion when the act of the party supposedly coerced is undertaken voluntarily, with alternatives available. Likewise, there can be no procurement of a breach of contract without an affirmative effort to do so. There was none. As they apply to the instant case, the effect complained of by Stewart of an interference which his contractual rights and a conspiracy to interfere with those rights or his business is the same.

It goes without saying that a conspiracy must begin with a joining of two or more persons or entities for the purpose of that conspiracy. One can conspire with others but not with himself. This Court in the case of McDonald v. Goodman, Ky., 239 SW 2d 97, (1951) defined a conspiracy as "a corrupt or unlawful combination or agreement between two or more persons to do by concerted action any unlawful act, or to do a lawful act by unlawful means." Hinkle was dismissed as a party by the Court below for the obvious reason that it played no part in events which are the subject matter of this case. The president of Strunk who incidentally happened to be an officer of Hinkle, began the sequence of events present here. Hinkle neither did nor intended to do anything. The independent truck drivers who later hauled Mullican's stone were merely bystanders. The record is completely devoid of any showing that these truck drivers participated in any way in the com-

mission of the acts complained of. No other party, involved in this action or otherwise established by the record, is alleged to have been a co-conspirator with Strunk.

It is strongly urged that there could have been no conspiracy on the part of Strunk as alleged by Stewart nor did such a conspiracy in fact occur.

Somerset Stone Company, at the request of Strunk, acquired the sum of $909.85 due from Somerset Stone Company to Stewart and paid it over to Strunk. Stewart owed that sum of money to Strunk. The record discloses that the money in question initally came from Hinkle, but that is immaterial because it made a difinite stop in the hands of Somerset Stone Company and at that time became its property. What Somerset Stone Company did with the money beyond that point was beyond the control of Hinkle. What is material, however, is that at no time, as disclosed by the record, did Strunk request that the money be acquired from Stewart by Somerset Stone Company unless it, by the testimony of Stewart's own witness, Richard Cooper, could be gotten agreeably with Stewart, or by the testimony of Frank Yocum, President of Strunk, simply could be gotten. Mr. Cooper's testimony was very simply that Stewart didn't like the deduction from his check, but that he said Stewart expected it, and that Stewart accepted the check from the amount due Stewart less the amount deducted for Strunk and left. The reasonable inference from this evidence is certainly that Stewart did agree with the deduction from his check and the payment of the deducted amount to Strunk. In fact, the record discloses that Stewart did not demand the deducted sum. As evidenced by Cooper's holding the deducted

money for some eight (8) days to pay it to Stewart if demanded, if Stewart had demanded it at the time it was deducted and he received a check for the balance, it obviously would have been paid to him.

It is submitted that in respect to all claims of Stewart against Strunk, there existed no material issue of fact establishing or tending to establish such claims about which reasonable jurors could disagree and that therefore a directed verdict in favor of Strunk and against Stewart should have been granted.

(b) THE CLAIM OF THE APPELLEE, J.D. MULLICAN, INC.

The claim of Mullican in the instant action was, as is the case of Stewart, based on the theory of interference with contractual rights. The arguments in regard to that claim of Stewart, made above, are as applicable to the claim of Mullican as they were to the claim of Stewart and are therefore relied upon by Strunk in that respect. It would be repetitious to reiterate those arguments here. However, it should be pointed out that Mullican, by making a contract with Stewart, allowing him to haul all of the stone needed by Mullican on its job, entered into a contract which it had no way of knowing it could perform. Mullican made no effort to contract for all the stone it would need and which it agreed that Stewart could haul and subsequently had no stone for Stewart to haul. In addition, Mullican has no standing in this case to assert a claim against Strunk for interference with Mullican's contractual rights, when the record clearly discloses a voluntary act on the part of Mullican which itself constitued the breach of Stewart's contract, if in fact such a breach occurred. No breach occurred

if at all, until Mullican purchased stone independently of Stewart, to be hauled by someone other than Stewart. Nor can Mullican be heard to say that it did not do so voluntarily, as shown in the arguments above, Mullican made no effort to secure an alternative source for stone and thereby keep intact his contract with Stewart. Had Stewart hauled Mullican's stone there would not have been a breach of contract nor would there have been any claim by Stewart against Strunk. Even after Mullican began to purchase its stone from Strunk, and thereby paid for it to be hauled by someone other than Stewart, Mullican could have ceased at any time. There was no obligation between Mullican and Strunk for either to deal with the other. It is submitted that the simple fact is that if any party was guilty of committing a wrongful act against Stewart, then that party was Mullican, or it was likewise as guilty as any other party in that respect.

A directed verdict should have been granted to Strunk in regard to the claim of Mullican for the reason that no issue of fact existed material thereto which established or tended to establish such claims. A directed verdict in favor of Strunk against Stewart, compels a directed verdict in favor of Strunk against Mullican.

2. IT WAS ERROR FOR THE COURT BELOW TO INSTRUCT THE JURY ALLOWING RECOVERY BY THE APPELLEE, JAMES LEF STEWART, OF PUNITIVE DAMAGES.

By its instruction No. 2, (R. p. 75) the Court below enabled the jury to return a verdict in favor of Stewart and against

Strunk for punitive damages. Strunk objected to the giving of such instruction for the reason that the facts established by the testimony failed to support the giving of a punitive damage instruction, the necessary elements for the giving of which an instruction being completely absent from the case (Tr. p. 263).

This Court established the basis on which punitive damages are recoverable in the case of Ashland Dry Goods Co. vs. Wages, Ky. 1958 SW 2d 312, 302 Ky. 577 (1946) where it said:

> "punitive damages are damages other than compensatory or nominal damages awarded against a person to punish him for his outrageous conduct. The purpose of awarding punitive damages, sometimes called 'smart money,' is to punish the person doing the wrongful act and to discourage such person and others from similar conduct in the future. Such damages are proper only when the wrongful act is wanton, malicious or reckless. There must be a showing that the acts were either willful or malicious or that they were performed in such a way as would indicate a gross neglect or disregard for the rights of the person wronged."

This principle was reiterated by the Court in the case of Hensley v. Paul Miller Ford, Inc., Ky. 508 SW 2d 759 (1974).

The evidence is clear, as discussed, supra, that there was no wantoness, maliciousness or recklessness on the part of Strunk in its actions toward Stewart. To the contrary, the record discloses that Strunk not only had justification for its acts, but

had every reason to believe that it was justified. Again, Strunk, at the time it performed the acts complained of, had no contract with Stewart or Mullican, knew of no contract between Stewart and Mullican, had a right to act as it did, had complete justification for its acts, and had no intention to interfere with the contract rights of Stewart. Therefore, there were no willful or malicious acts by Strunk toward Stewart. Likewise, it must be stated that when Strunk acted in ceasing loading Stewart's trucks, it did so in the exercise of its absolute right to sell stone according to its terms, such right being paramount to any right of Stewart then existing. It is submitted that their was no outrageous conduct on the part of Strunk toward Stewart, nor was there, in view of the fact that there was no knowledge on the part of Strunk pertaining to any contractual right of Stewart, inferior to the rights of Strunk or otherwise, a gross neglect or disregard for the rights of Stewart. It is further submitted therefore, that a punitive damage instruction was not proper in the instant case.

3. THE JURY VERDICT IN THE COURT BELOW WAS EXCESSIVE IN REGARD TO PUNITIVE DAMAGES, APPEARING TO HAVE BEEN RENDERED UNDER THE INFLUENCE OF PASSION OR PREJUDICE.

This Court set forth the principle in the Hensley case, supra, at page 763, that the amount of punitive damages recovered should be considered in light of the seriousness of the injury and the culpability of the one causing the injuries. The Court also reiterated in the Hensley case, supra, the prin-

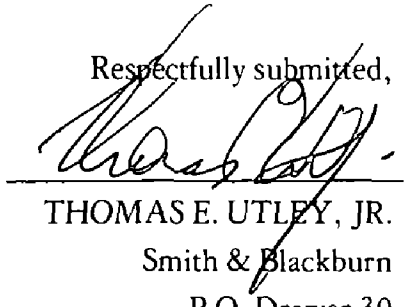
cipal that punitive damages must bear some relationship to the injury and the cause thereof, and not excessive in light of the facts of the case. The Court further stated that decisions as to excessiveness of punitive damages must be made on a case-by-case basis.

It is clear from the evidence in this case discussed, supra, that there is not a sufficient relationship of the punitive damages to the injury and cause. The best that could be said in support of an argument for punitive damages is that this is a marginal question of culpability on the park of Strunk. Simply stated, Strunk's conduct was not outrageous enough, if at all, was not willful or malicious, and was not such as would indicate a gross neglect or disregard for Stewart's rights. It can only be assumed that the jury below was inflamed and influenced by that passion in their verdict.

CONCLUSION

It is therefore respectfully submitted that the judgment of the Lower Court in the case at bar be reversed and the Appellant granted proper relief, and it is requested, since Appellant moved appropriately for a Directed Verdict and also filed its Motion for Judgment Notwithstanding the Verdict and in the alternative for a new trial, that this Court render an opinion directing the Lower Court to enter a judgment in favor of Appellant as against both Appellees.

Respectfully submitted,



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